Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Inquiry on Rules Affecting	)	MB Docket No. 05-28
Competition in the Television	)	
Marketplace	)	
	)	

COMMENTS OF JOINT CABLE COMMENTERS

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SUMMARY

In enacting the Satellite Home Viewer Extension Reauthorization Act ("SHVERA"), Pub. L. No. 108-477, 118 Stat. 2809 (2004), Congress sought the Commission's review of various rules affecting competition in the multichannel video programming distribution marketplace. Among these rules is retransmission consent. Retransmission consent has had far-reaching effects on the television marketplace. Many of these effects were not anticipated at the time the policy was enacted.

Although the marketplace has generally operated well and in the consumer interest over this period, some have expressed surprise that the emergence of competition has coincided with an increase in the price of the most popular tier of cable services that exceeds the rate of inflation, in large part because the size of the package and the number of choices it provides has also increased significantly over the period. The reasons for this are closely tied to the exercise of retransmission consent by the "Big Four" networks, ABC, CBS, Fox, and NBC.

TABLE OF CONTENTS

TABLE OF CONTENTS, cont.

Before the
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WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Inquiry on Rules Affecting Competition in the Television Marketplace	)	MB Docket No. 05-28
	)	
	)	
	)	

Advance/Newhouse Communications, Cox Communications, Inc., and Insight Communications (the "Joint Cable Commenters") respectfully submit these comments in response to the Commission's above-captioned inquiry.[1] Video programming providers, including ABC/Disney, CBS/Viacom, Fox/NewsCorp and NBC/GE/Universal (the "Big Four"), negotiate with the Joint Cable Commenters for distribution over cable systems nationwide.

Advance/Newhouse Communications manages Bright House Networks, which has cable systems serving over 2.2 million subscribers in and around Tampa Bay and Central Florida, Indianapolis, Birmingham, Bakersfield, and Detroit, along with several smaller systems in Alabama and the Florida panhandle.

Cox Communications is the third largest cable provider with approximately six million cable customers nationwide. Cox's twelve largest clusters are in Louisiana, Nevada, Arizona, California, New England, Virginia, Texas, Oklahoma, and Kansas.

Insight Communications is the ninth largest cable operator in the United States and serves approximately 1.3 million cable customers, all of which are concentrated in

[1] *Media Bureau Seeks Comment for Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, MB Docket No. 05-28, DA 05-169 (rel. Jan. 25, 2005).

the four contiguous states of Indiana, Kentucky, Illinois, and Ohio. Insight also manages additional systems in Indiana and Kentucky that are owned by an affiliate of Comcast Cable.

INTRODUCTION AND OVERVIEW

In enacting the Satellite Home Viewer Extension Reauthorization Act ("SHVERA"), Pub. L. No. 108-477, 118 Stat. 2809 (2004), Congress sought the Commission's review of various rules affecting competition in the multichannel video programming distribution marketplace. Among these rules is retransmission consent.

During the 1970s, national communications and copyright policy with respect to local broadcast carriage on cable television was clear: cable systems were required to carry broadcast stations and local broadcast stations were not permitted to charge for carriage. In 1985, the D.C. Circuit Court of Appeals struck down the Commission's 1972 "must carry" rules embodying this policy. In 1992, Congress reinstated must carry and adopted retransmission consent, which allowed broadcast stations to opt out of must carry and enter into market-based carriage agreements with cable systems and other multichannel video programming distributors.[2] Inherent in retransmission consent was the right of broadcast stations to deny permission for carriage of their signals by multichannel video programming distributors ("MVPDs") in the absence of carriage agreements.

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[2] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.) ("1992 Cable Act"). *See also* 47 C.F.R. 76.64. In 1999, Congress enacted the Satellite Home Viewer Improvement Act, Pub. L. No. 106-113, 113 Stat. 1501, which allows DBS companies to offer local broadcast channels to their subscribers and allows broadcasters to negotiate compensation for providing them with retransmission consent. *See also* Satellite Home Viewer Extension Reauthorization Act ("SHVERA"), Pub. L. No. 108-447, 118 Stat. 2809 (2004) (extending retransmission consent authority).

It is clear that retransmission consent has had far-reaching effects on the television marketplace -- it has affected broadcast networks and their owned and operated ("O&O") station groups, independent broadcasters, cable and DBS operating companies, independent programmers, and consumers. It is also clear that many of these effects were not anticipated by policymakers, various business interests, or consumer representatives at the time retransmission consent was adopted. The review that Congress has directed and which the Commission is now undertaking is therefore entirely necessary and appropriate.

Congress enacted retransmission consent in the 1992 Cable Act in order, *inter alia*, to preserve free over-the-air local broadcast television and to strengthen, on behalf of the then 40 percent of Americans without cable, the ability of free over-the-air television to compete against what was then the only viable MVPD in the country -- cable television. Much has changed in the last twelve years. Today only 15 percent of Americans are dependent on free over-the-air local television, MVPD service competitive to cable is available everywhere in the nation from two strong DBS competitors, and the percentage of Americans receiving multichannel television from a non-cable competitor has risen tenfold, to nearly 30 percent. The emergence of direct competition from telephone company-based MVPDs is also on the near horizon.[3]

We believe the marketplace has generally operated well and in the consumer interest over this period. We believe our offerings, and those of our MVPD competitors, are of extremely high quality and are perceived by consumers to provide outstanding value. Nevertheless, some express surprise that the emergence of competition in the

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[3] *See, e.g.,* "Verizon Pushes Calif. Entry Bill," *Multichannel News*, February 22, 2005.

MVPD marketplace has nevertheless coincided with an increase in the price of the most popular tier of cable services that exceeds the rate of inflation, in large part because the size of the package and the number of choices it provides has also increased significantly over the period.[4] The reasons for this are closely tied to the exercise of retransmission consent by the Big Four networks, ABC, CBS, Fox, and NBC.

Attached to these Comments is a report entitled "The Social Cost of Retransmission Consent Regulations" by William P. Rogerson, Professor of Economics at Northwestern University. Professor Rogerson reviews evidence from the video programming distribution marketplace and concludes that the Big Four national broadcast networks have used retransmission consent negotiations for carriage of their O&O broadcast stations in order to obtain higher license fees and broader distribution for their affiliated cable channels than would otherwise be the case absent the triennial carriage negotiation mandated by the retransmission provisions of the 1992 Cable Act. In essence, retransmission consent has enabled the Big Four networks to utilize the broadcast spectrum granted to them for free by the public in order to launch and expand cable channels. Professor Rogerson finds that:

> There have been concerns raised in the policy community and in Congress that cable prices are too high and that high programming costs have played a major role in causing this problem. Furthermore, there is concern both that license fees for individual cable channels are too high and that perhaps too many new channels have been launched and included in the expanded basic package that subscribers must purchase. Retransmission consent has contributed to these problems by giving broadcasters the incentive and opportunity to ask for payment for retransmission consent

[4] *See, e.g.,* Letter from John McCain, Chairman, US Senate Committee on Commerce, Science, and Transportation, to Michael Powell, Chairman, FCC, May 19, 2004.

> by (1) charging higher prices for cable channels and (2) requiring MSOs to launch new channels that they might otherwise not have launched.[5]

Professor Rogerson's study finds that the manner in which network broadcasters have used retransmission consent has been a major contributing factor to the size and price of the expanded basic tier. Through their use of retransmission consent, MVPD program networks owned by the Big Four account for a disproportionate share of new channels added to the expanded basic tier of programming. These new channels have driven rate increases for that tier in recent years, since the per-channel costs for the expanded basic tier have been largely stable and have actually fallen when adjusted for inflation. Thus, higher prices for the expanded basic tier are being driven by the addition of new channels to that tier, and programming networks affiliated with the Big Four represent the overwhelming share of such channels. Thus, there is substantial evidence that the exercise of retransmission consent by the Big Four has been a principal driver of cable rate increases and to the size of the expanded basic tier.

On the other hand, there is no evidence that retransmission consent has accomplished Congress' original objective of strengthening the availability of free, local over-the-air television. This impact of retransmission consent on competition in the MVPD marketplace is likely to continue and increase as facilities-based competition grows.

[5] "The Social Cost of Retransmission Consent Regulations," by William P. Rogerson, Professor of Economics at Northwestern University ("Rogerson"), at 52.

I. A PRINCIPAL EFFECT OF RETRANSMISSION CONSENT HAS BEEN ITS USE BY NETWORK BROADCASTERS TO BECOME DOMINANT PROVIDERS OF MVPD PROGRAMMING

Since 1992, the Big Four broadcast networks (and their parent companies) have found the retransmission consent regime to be an effective tool for leveraging their power in local broadcast markets into the national market for MVPD programming. Through a process of joining retransmission consent negotiations with carriage negotiations for broadcaster-owned MVPD networks, and against a backdrop of threatened withdrawals of "must-have" local broadcast programming, the retransmission consent regime has enabled the Big Four to launch new programming networks and to obtain higher license fees and broader distribution for those networks, thereby making them the dominant force in MVPD programming. This process has resulted in continuing fragmentation of the video programming marketplace, and has thereby reinforced the market power enjoyed by the Big Four in retransmission consent negotiations.

A. Network Broadcasters Have Used The Leverage Of Retransmission Consent To Facilitate Their Entry And Growth Into MVPD Programming

The retransmission consent provisions adopted in the 1992 Cable Act prohibit cable operators and other MVPDs from retransmitting commercial television stations without first obtaining the licensee's permission.[6] In enacting retransmission consent, Congress empowered broadcasters to demand consideration for carriage of free, over-the-air local broadcast signals by cable systems and did not specify or limit the form that such consideration might take. In 1996, just three years after retransmission consent had taken effect, the Commission observed that obtaining retransmission consent by agreeing to

[6] 47 U.S.C. § 325(b)(1).

carry a broadcaster's affiliated cable programming was "common during the initial implementation phase of the retransmission consent process and . . . appear[s] to have been widely utilized by the cable television industry instead of cash payments."[7] *Forbes* recently summarized the evolution and competitive impact of retransmission consent as follows:

> Retransmission consent . . . was benignly designed as a way to ensure that broadcast stations would be compensated for the retransmission of their programs on cable. But retransmission consent has since morphed into the bludgeon used by media conglomerates to ensure their ancillary cable networks get favorable distribution in exchange for allowing cable companies the right to use their network affiliates' broadcast signals. As a result, 38 of the 50 biggest cable networks, including ESPN(ABC/Disney), Nickelodeon (CBS/Viacom), Fox News (Fox) and USA (NBC/GE) are now owned fully or partially by broadcasters or big cable outfits.[8]

The emergence of MVPD carriage as the preferred form of consideration in retransmission consent agreements likely was influenced by a variety of factors. Cable operators, already under pressure to lower basic service rates as a result of new regulations adopted by the Commission and new rate regulation authority exercised at the local level by municipalities, were loathe to begin paying cash for carriage of broadcast stations that were available over-the-air for free.[9] Further, during the first year of retransmission consent, the Commission's rate rules expressly barred pass-through of cash payments for retransmission consent, and any such pass-throughs attempted after year one were subject to review and potential revision by local franchising authorities

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[7] *Capital Cities/ABC, Inc. (Transferor) and the Walt Disney Company (Transferee) For Consent to the Transfer of Control of Licenses*, 11 FCC Rcd 5841, ¶ 26 (1996).

[8] "Chop Schlocky TV," *Forbes*, December 13, 2004, at 164.

[9] Rogerson at 46.

regulating basic service rates.[10] Cable operators were looking for new programming, and the rate regulation regime of the 1992 Cable Act made carriage of new programming an alternative form of consideration.

Meanwhile, broadcasters contemplating retransmission consent deals had to confront the possibility that studios and content owners would demand a substantial share of any cash payments received -- either through content licensing negotiations or via legislative action.[11] In addition, as Professor Rogerson observes, the networks may have implicitly recognized that utilizing their public spectrum in a manner that required cable subscribers to pay higher rates in order to watch programming they could view over-the-

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[10] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd 5631, 5785 n.588 (1993) (adopting limit on pass-through of retransmission consent fees for one year).

[11] "Don't Count Retrans Bucks Yet," *Variety*, October 5, 1992 ("Hollywood TV distributors, particularly the major studios, . . . are writing clauses into contracts for syndicated shows that, in effect, cut the distributor in on any cash a TV station rakes in through retransmission consent"); "Many Players Eye Retransmission Pot," *Broadcasting*, October 12, 1992 ("Although Hollywood and other program providers won't get a direct cut of retransmission-consent fees, its likely they will be compensated. and the discussions are already under way on how to keep everyone happy. Two studio executives . . . both said they expect some form of compensation from retransmission-consent revenues. Said one: 'It's not that we don't know they've been under pressure. We're aware of the effect of cable on their business . . . We're just saying that we view our programming as the thing that gives them the greatest value, and that's why we would like some compensation.'"); "Hughes Introduces Bill To Force Broadcasters to Pay Copyright Owners," *Communications Daily*, January 7, 1993 ("Broadcasters don't directly own rights to programming they transmit, Hughes said, so they shouldn't be able to sell retransmission rights. 'You should not be able to sell something you don't own.'"); "Down to the Wire," *National Journal*, May 16, 1992 ("Valenti argues that [retransmission consent] deals between cable operators and broadcasters would leave his members out in the cold by giving broadcasters control over copyrighted programs. 'We don't oppose a second stream of income for broadcasters,' he told members of the House Intellectual Property Subcommittee. 'But in the name of reason and justice, creative program owners cannot be exiled from their rightful share of royalties.'").

air for free had the potential to create a public backlash that might have limited or eliminated future retransmission consent negotiation opportunities.[12]

Regardless of the range of reasons why cable carriage emerged as the dominant form of consideration in retransmission consent agreements, it is indisputable that it did.[13] One trade publication summarized the initial round of retransmission consent negotiations as follows:

> The major media companies . . . leveraged their retransmission rights into MSO support for new cable programming services. ABC launched ESPN 2 that way, while NBC and Microsoft launched news channel MSNBC, and News Corp. developed FX. And some broadcasters believe those initiatives crushed any hope they had of getting cash for their broadcast signals. "That really created a great value shift" away from broadcast television to cable TV, explained LIN Television Chairman Gary Chapman. "It undermined our ability to get paid for our broadcast signals."[14]

Fox was the first of the broadcast networks to use retransmission consent to create a new national cable network, FX, which was subsequently launched in 1994.[15] Offering scant benefit to the local Fox stations whose threatened withdrawal from cable systems

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[12] Rogerson at 40-41 ("Obtaining carriage for affiliated cable channels, rather than cash, may in fact strengthen and prolong the broadcasters' continued ability to charge for retransmission consent by obscuring the real costs of such transactions").

[13] *See* "What a Year It's Been For Affiliates; Signs Point to Network Conglomerates Having the Edge in Dealmaking," *Multichannel News*, May 3, 2004 ("With retransmission consent as the law of the land, media giants have not been shy about using it as a chit to leverage distribution of their new cable channels. Having many cable networks under one roof also leads programmers to package them together, with popular services driving carriage of less-popular ones").

[14] *See* "Smulyan: Retrans or Bust," *Broadcasting and Cable*, December 16, 2002.

[15] Jessell, "The Shifting Fortunes of Retransmission Consent," *Broadcasting and Cable*, May 12, 2003 at 45 ("[M]ultimedia companies led by Fox used their retrans rights to get carriage (and license fees) for new cable networks. This is how FX came to be"); Bokiek, "Cablers, Programmers Duke it Out on the Hill," *Hollywood Reporter*, May 7 2003 ("News Corp., for example, launched the FX channel in 1994 using the retransmission consent leverage it had with cable operators from its Fox O&Os and many Fox affiliate stations").

was leveraged to launch the service, FX brought Fox an additional $0.25 per subscriber per month -- as well as advertiser revenues -- for a brand new, untested network.[16] By 2000, the support provided to FX by Fox's broadcast network and sports programming assets had succeeded in solidifying its status as a broadly distributed service that could not only command a significant license fee, but could be used to help incubate other Fox services.[17]

Once Fox developed the template of using cable carriage as retrans currency, the other three networks followed suit. ABC's owned and operated broadcast stations required carriage of ESPN2 as a condition of granting retransmission consent,[18] while NBC required launch of America's Talking -- which would later become MSNBC -- as the price of access to its owned and operated stations.[19]

After the initial round of retransmission consent agreements, the Big Four used subsequent negotiating cycles to obtain carriage of additional affiliated cable channels. For example, Fox has used retransmission consent to launch or expand carriage of Fox

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[16] *See* Halonen, "Looking back at retransmission: Stations, Cable Operators Questioning Validity of Regulations 10 Years Later," *Electronic Media*, March 4, 2002 ("But before broadcast signals disappeared from cable screens nationwide, News Corp. chief Rupert Murdoch broke the impasse with a face-saving deal in which he swapped retransmission rights for Fox stations to TCI in exchange for the cable MSO's support of a new Fox cable channel, FX, along with a fee of 25 cents per subscriber").

[17] *See* "FX Bullish on Distribution," *Multichannel News*, May 8, 2000 (noting two-year growth of FX from 35 million to 53 million by end of 2000, and quoting Fox executive: "FX is in such demand now that we have a couple of instances where we're using the strength of FX to get deals done for other nascent channels, smaller channels").

[18] *See* "ABC Says It Avoided 'Bloody Battle' on Retrans by not Seeking Money," *Communications Daily*, January 13, 1994.

[19] "Newest Cable Act Child: America's Talking," *Variety*, June 27, 1994 - July 3, 1994 (characterizing America's Talking as one of the "creatures of the Cable Act of 1992, which said in one of its clauses that stations could demand payment from a cable system for picking up and retransmitting their signals").

News and the National Geographic Channel.[20] Retransmission consent for ABC/Disney's owned and operated stations also fostered the launch and growth of SoapNet and Toon Disney.[21] As Professor Rogerson concludes:

> [T]here appears to be almost complete and unanimous agreement among industry participants, including the broadcasters themselves, the press, and industry analysts, that broadcasters bundle retransmission consent together with other cable programming they produce and use this as a bargaining chip to negotiate some combination of higher license fees and increased carriage than they otherwise would have been able to negotiate.[22]

Presently, the Big Four continue to leverage retransmission consent in order to gain carriage of channels of affiliated cable channels at higher rates and on more favorable terms than would otherwise have been the case had those channels been required to compete solely on their own merits. Last year, for example, EchoStar's DISH Network DBS service acquiesced to Viacom/CBS' "insistence that DISH carry nets it

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[20] Walley, "Fox Takes 24-Hour Cable News Plunge," *Electronic Media*, February 5, 1996 at 1 (Mr. Murdoch said "Fox will use retransmission consent for its owned TV stations as leverage to get carriage for the Fox news channel on U.S. cable systems"); McAdams, "Nature Around the Clock; National Geographic Goes For National Demographic With 24-Hour Cable Network," *Broadcasting and Cable*, August 28, 2000 at 20 ("National Geographic will launch in 10 million [homes], but thanks to its partnership with Fox the channel already has commitments for 25 million homes within four years, from AT&T, Adelphia and DirecTV alone. National Geographic gave Fox a 66% interest in the domestic channel, primarily to get the thing into homes, according to industry sources. Fox has not only the cash to cover substantial launch support but has the negotiating leverage of retransmission consent and regional sports channels that cover some 72 million homes across the country. Fox has managed to launch four national networks in the past four years, copping hard-to-get analog carriage for each.").

[21] *See, e.g.*, "A Kiss Away from the Magic 50M Mark," *Multichannel News*, February 7, 2005 ("Like most of the programming giants, the Mouse uses retransmission-consent to drive distribution for services such as SoapNet. That's a sore point that continues to irk cable operators."); "ABC Reusing Toon Model," *Electronic Media*, April 12, 1999 (Noting that Disney viewed retransmission consent as a "valuable bargaining chip with cable operators," regarding carriage of Disney-owned cable channel, SoapNet, whose "core" programming are "four ABC-owned soap operas").

[22] Rogerson at 37.

didn't want (Noggin, NICK GAS and Nick Too). Eventually the two companies worked something out, leading to carriage for all the cable networks . . ."[23] In the aftermath of the dispute, EchoStar spokesman Steve Caulk described retransmission consent as a mechanism that allows broadcasters to use the "publicly owned airwaves as leverage to force us into unacceptable contractual arrangements."[24]

Fox reportedly plans to use retransmission consent negotiations to spur distribution of its new reality programming network, Fox Reality Channel.[25] ABC/Disney and Viacom/CBS apparently have similar plans for ESPNU and Logo, respectively.[26] And NBC reportedly plans to make its fledgling network, NBC Weather Plus, a key condition of upcoming retransmission consent deals.[27]

B. Network Broadcasters Have Used The Threat Of Withdrawing Local Broadcast Stations From MVPD Subscribers In Order To Obtain Higher License Fees And More Favorable Carriage Terms For Affiliated MVPD Networks

The Commission has observed that "that carriage of local television broadcast station signals is critical to MVPD offerings."[28] By authorizing them to demand compensation for carriage of their signal, retransmission consent furnished broadcasters with a powerful tool for leverage: the right to withhold access to their signal from cable

[23] Kagan World Media, *Economics of Basic Cable Networks 2005*, July 2004, at 9.

[24] "What a Year It's Been For Affiliates; Signs Point to Network Conglomerates Having the Edge in Dealmaking," *Multichannel News*, May 3, 2004

[25] *See* "Startup Channel Finds Reality Bites," *Broadcasting and Cable*, February 21, 2005.

[26] *See* "Coming Up Next: A Trio on Steroids," *Multichannel News*, February 7, 2005.

[27] "NBC Weather Net Seeks Affils," *Multichannel News*, November 22, 2004.

[28] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Tranferors And The News Corporation Limited, Transferee For Authority to Transfer Control Memorandum Opinion and Order*, 19 FCC Rcd 473, 565 ¶ 201 (2004) ("*News Corp./DirecTV Merger Order").*

subscribers. The leverage afforded network broadcast stations by retransmission consent was particularly formidable due to the popularity of broadcast network programming.[29] There are no ready substitutes for events like the Super Bowl, the World Series, the Olympics, and other major league professional sporting events carried by the broadcast networks. In recent years, popular network televisions shows such as "Friends," "24," "CSI," "Desperate Housewives," "Law and Order," "Survivor," "American Idol" and others have come to be regarded as "must-have" programming. MVPDs risk significant subscriber defections if they fail to offer their subscribers access to these and other network programs which dominate their time slots. Likewise, in the local markets of each of the 32 NFL teams (which are present in 22 of the top 25 television markets in the country), there is no substitute for the home team games carried by Fox, CBS, or ABC.

After examining the consumer response to both the withdrawal of network signals as a result of retransmission consent disputes and the introduction of broadcast signals to DBS customers, Professor Rogerson concludes that there is "substantial evidence" that "the signals of the four broadcast networks are 'must have' programming which create market power for their providers."[30] In the *News Corp/DirecTV* proceeding, the Commission itself determined that News Corp.'s Fox network stations "possesses market power in the broadcast station segment of the video programming market," and that "the signals of local television broadcast stations are without close substitutes."[31]

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[29] *See* Rogerson at 31-37.

[30] Rogerson at 20.

[31] *News Corp./DirecTV Merger Order* at ¶ 202. As Professor Rogerson points out, this conclusion stands apart from the Commission's ultimate merger-specific finding in the *News Corp./DirecTV* proceeding that the transaction would enhance News Corp.'s already existing power, requiring the imposition of conditions. *See* Rogerson at 25-26;

A cable operator's only source of bargaining power in retransmission consent negotiations with a broadcast station is its ability to decide not to carry the signal of that station. That ability, however, is restricted both by rule[32] and by practical reality since it is the cable operator that bears the brunt of any public fall-out arising from a failure to reach agreement with a broadcast station. Broadcasters' position in retransmission consent negotiations is further strengthened by the Network Non-Duplication rule[33] and the Syndicated Exclusivity rule,[34] which exist for other valid policy reasons but, in practical effect, prevent the MVPD for obtaining a substitute for the station. As a result, each network affiliate is protected from intra-brand competition within its local marketplace, with the unintended result of strengthening the exclusivity that government regulations grant network broadcasters, thereby further enhancing their negotiating leverage during retransmission consent discussions.

Broadcast networks have not hesitated to withhold their signal -- or to threaten to do so -- in order to obtain higher license fees and more favorable terms for affiliated cable channels. As Professor Rogerson puts it:

> The networks bundle their retransmission consent negotiations together with negotiations over license fees for cable channels that they also produce. They have used the threat that they might withdraw retransmission consent to force cable operators to (1) pay higher prices for programming that the operators might have purchased in any event, and (2) purchase additional programming that they might otherwise not have purchased.[35]

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see also Report on the Packaging and Sale of Video Programming Services to the Public, November 18, 2004, at 75-80.

[32] *See* 47 U.S.C. 534(b)(9); 47 C.F.R. § 76.1601, note 1 (2002).

[33] 47 C.F.R. § 76.92.

[34] 47 C.F.R. § 76.101.

[35] Rogerson at 3-4.

We describe three examples from the public record below.

- Last year, during negotiations over retransmission consent between Viacom/CBS and EchoStar, 1.6 million Echostar subscribers lost access to CBS programming for two days. Fearing "astronomical costs" from subscriber defections to rival MVPDs, Echostar eventually acquiesced to Viacom/CBS' demands that it carry additional cable channels on its DBS system.[36] Following settlement of the dispute, the *Wall Street Journal* characterized the agreement reached by the parties as "a retreat by Echostar Chairman and Chief Executive Charles Ergen, who acknowledged accepting roughly the terms that were on the table at the height of the impasse."[37]

- In 2000, News Corp. demanded carriage of Fox Movie Channel or Fox Sports World to all Cox Communications digital subscribers nationwide when the two were negotiating a retransmission consent agreement covering Fox station WTTG-TV. News Corp. demanded this even though less than a quarter of Cox Communications' cable customers were receiving service from News Corp. owned and operated stations.[38]

The dispute arose near the beginning of the NFL playoffs and subjected Cox Communications to significant negative customer relations in several markets.[39] During the course of negotiations, satellite providers "profit[ed]" from the disruption of service,

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[36] *See* Bill Carter and Geraldine Fabrikant, *Accord Said to be Near in Viacom-EchoStar Dispute,* New York Times, March 11, 2004, at C1; *see also* Joe Flint, *They Killed Kenny! And Spongebob!,* Wall Street Journal, March 11, 2004, at B3.

[37] Andy Pasztor and Joe Flint, *Viacom and Echostar Reach Accord on New Contract Terms*, Wall Street Journal, March 12, 2004, at B5.

[38] *See Comments of Cox Enterprises, Inc.,* MB Docket No. 02-277, at 45 (January 2, 2003) (*"Comments of Cox"*).

[39] *See* Linda Moss, "Some Subs Who Lost Fox Get Refunds from Cox," *Multichannel News*, January 17, 2002, at p. 3.

aggressively marketing themselves to consumers as an alternative to Cox.[40] Eventually, Cox Communications agreed to carry the channels and to pay News Corp. a rate based on all Cox Communications digital subscribers nationwide, even though only approximately 65 percent of these customers subscribed to a service tier that contained Fox Sports World or Fox Movie Channel. Because the rate was based on all digital subscribers and not just those who receive these channels, the per subscriber costs were inflated by nearly 50 percent.[41]

- In late 1999, Time Warner's Houston subscribers were notified of the possibility that Disney's owned and operated ABC station might be dropped from Time Warner's channel lineup due to the expiration of the cable operator's retransmission consent agreement.[42] ABC/Disney's retrans demand was that Time Warner begin to distribute Toon Disney and SoapNet in Houston, as well as convert the Disney Channel from a pay service into an expanded basic service and pay higher license fees for the service.[43]

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[40] Kristina Stefanova, *Satellite Soaring; Fox-Cox Flap Also Sells Antennas*, The Washington Times, January 4, 2000 at B8.

[41] *See Comments of Cox* at 46.

[42] Ann Hodges, *Viewers Shouldn't Worry About Channel 13's Status,* Houston Chronicle, December 4, 1999 at A7.

[43] *Flap May Put ABC Affiliate Off Air,* Associated Press, February 28, 2000. Reports also indicated that similar retransmission consent disputes between Disney O&Os and cable operators were simmering in at least four other markets, but that the cable operators in those areas had already received a 30-day temporary extension through the end of March. A Disney official was quoted as saying that "Houston was chosen as the battleground because it would be the least disruptive of the five cities." Mike McDaniel, *ABC to Yank Channel 13 off Time Warner,* Houston Chronicle, February 29, 2000, at A1.

Disney also promised "an unprecedented plan to help viewers purchase satellite dishes quickly."[44] On March 3, 2000, KTRK ran a full page ad in the *Houston Chronicle* (the first of many that would appear in the month of March) offering the first 1500 "Time Warner residential subscribers in the Houston DMA" a $99 rebate on the purchase of a DirecTV system.[45] The ABC/Disney station was pulled off the Time Warner system on May 1, 2000.[46]

The station was restored to Time Warner cable subscribers by the next afternoon, after being off the air for 39 hours.[47] The two sides agreed to another temporary extension until July 15.[48] On May 18, 2000, Time Warner and Disney announced that they had reached a tentative agreement, which was finalized a week later. News reports of the deal stated that Houston would "get ESPN Classic, ESPNews, SoapNet and Toon Disney," and that the Disney channel would be converted from a pay service to an expanded basic offering.[49]

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[44] *Flap May Put ABC Affiliate Off Air,* Associated Press, February 28, 2000.

[45] *See* March 3, 2000 advertisement included as Exhibit 1.

[46] *Time Warner Drops ABC Affiliates,* Associated Press, May 1, 2000; Mike McDaniel, *Time Warner Puts KTRK In The Dark; ABC Programs Off Lineup For Cable System's Customers,* Houston Chronicle, May 1, 2000, at A1.

[47] Mike McDaniel, *For ABC, To Air Is Divine: Time Warner Extends Retransmission Agreement,* Houston Chronicle, May 3, 2000, at A1.

[48] Mike McDaniel, *Fallout Continues From Time Warner-Disney,* Houston Chronicle, May 4, 2000, at H4.

[49] Mike McDaniel, *Time Warner, Disney Reach Tentative Deal,* Houston Chronicle, May 19, 2000, at A1; Mike McDaniel, *ABC-TV, Time Warner Reach a Final Cable Deal,* Houston Chronicle, May 26, 2000, at A1.

In connection with the *News Corp./DirecTV* merger, the Commission investigated the Houston example, obtaining access to confidential data from DirecTV. The Commission based its finding that News Corp. could benefit from temporary withholding its signals from cable operators on its Houston analysis. *News Corp./DirecTV Merger Order*, ¶¶ 206-208 (portions redacted).

As these three examples illustrate, the Big Four have not hesitated to leverage the threat of withdrawing their local broadcast stations from MVPD subscribers in order to obtain higher fees and more favorable carriage terms for their affiliated cable channels. Further, it is clear that such threats translate into tangible gains for the network broadcasters and their parent companies, because MVPDs can hardly afford the risk of subscriber defections and ill will associated with the loss of popular broadcast programming. As one industry official puts it: "Any MSO will tell you that retransmission consent is the silver bullet. . . . You can basically get anything you want with it, because no one can take off ABC, CBS, or NBC without the government, the regulators, the politicians and the consumers wearing out the operators."[50]

C. Retransmission Consent Has Enabled The Big Four Networks To Emerge As The Dominant Force In MVPD Programming

As a result of their use of retransmission consent, the broadcast networks and their parent companies today stand as the predominant suppliers of MVPD video programming. *Fortune* has likened ABC/Disney's use of retransmission consent to Microsoft's leveraging of its Windows operating system:

> Disney also did a pretty good imitation of Microsoft when negotiating cable carriage with Time Warner. How so? Think of ABC as Windows. It's the No. 1 network, the operating system everyone wants. To get ABC, Disney told Time Warner, you'll also have to pay for a bunch of not-so-hot channels (think of all the applications tied to Windows) that you don't really want: SoapNet, which is mostly repeats of daytime soap operas; Toon Disney, which is repackaged cartoons; and Disney Channel, an also-ran in the Nielsens to Viacom's Nickelodeon and Time Warner's Cartoon Network.[51]

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[50] "What a Year It's Been For Affiliates; Signs Point to Network Conglomerates Having the Edge in Dealmaking," *Multichannel News*, May 3, 2004.

[51] "Dumb and Dumber," *Fortune*, May 29, 2000, at 140.

Last year at an investor's conference, Disney chairman Michael Eisner reinforced that view by characterizing Disney's use of the retransmission consent process as follows:

> Without ABC in our own stations, we would not have been able to achieve the major growth we have realized at ESPN and our other cable holdings; because ABC offers the highly valued programming that cable operators need, i.e., retransmission consent.[52]

Since enactment of retransmission consent, the Big Four network broadcasters have collectively transformed themselves from marginal participants in the cable programming marketplace to the dominant force in MVPD network programming.[53] Since 1993, ownership of national MVPD programming networks by the Big Four broadcasters has more than tripled, from 18.2 percent to 56.5 percent.[54] In 1993 only one of the top five cable programming companies was a broadcast network; by 2004, four of the top five firms were major broadcast networks. The Big Four broadcast networks today own ten of the fifteen top-rated cable channels, compared to only three of fifteen in 1996.[55] A decade ago, broadcasters controlled only five of the twenty most widely distributed non-broadcast networks; today they control twelve of the top twenty.[56] The Big Four networks have spent the last twelve years investing heavily in MVPD networks,

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[52] *Walt Disney at Citicorp Smith Barney Entertainment, Media and Telecom Conference,* FC Wire, Jan. 6, 2004.

[53] *See* Rogerson at 6-12 and Tables 1-7.

[54] Rogerson, Table 3.

[55] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, MB Docket No. 04-227, at 148 Table C-7 (rel. Feb. 4, 2005) ("*2005 Video Competition Report*"); Kagan, *Economics of Basic Cable Networks* (2005) at 60; Kagan, *Economics of Basic Cable Networks* (1996) at 39-40.

[56] *Eleventh Annual Report* at 147 Table C-6; Kagan, *Economics of Basic Cable Networks* (2005) at 30-31, 60; Kagan, *Economics of Basic Cable Networks* (1996) at 39-40.

which has resulted in their aggregate creation and/or acquisition of over 50 national programming networks and over a dozen regional networks.[57]

While the networks' broadcast viewership has declined over the last ten years, their primetime television audience ratings have actually increased due to the dozens of programming networks they have launched or acquired:[58]

Table A
Summary of Rogerson Table 7

	1997 Prime Time Rating	**2003 Prime Time Rating**
ABC Broadcast Network	9.3	6.7
ABC MVPD Networks	2.0	5.0
ABC Total	**11.3**	**11.7**
CBS Broadcast Network	9.4	8.3
CBS MVPD Networks	0	6.3
CBS Total	**9.4**	**14.6**
Fox Broadcast Network	6.7	5.9
Fox MVPD Network	.3	2.1
Fox Total	**7**	**8**
NBC Broadcast Network	10.7	7.7
NBC MVPD Networks	.5	3.1
NBC Total	**11.2**	**10.8**
BIG 4 TOTAL	**38.9**	**45.1**

In addition, using retransmission consent to launch or strengthen affiliated MVPD networks ensures that such networks made available via increased capacity of cable and DBS systems are used to draw revenues toward -- and not away from -- the broadcast networks and their parent companies.[59]

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[57] Rogerson, Table 6.

[58] Rogerson, Table 7.

[59] "Fox Woos Affils on Retrans," *Variety*, June 4, 1993 ("Affiliates, who voiced concerns about the cable service competing with their programming, also seemed to accept Fox's contention that it would be significantly less prominent than Fox Broadcasting. . . . 'If by not launching this new channel, we could assure you that we and you would face no new competition [from cable], then this question would make a lot of sense,' [Fox executive] Padden said. He added that the reality is broadcasters are

The opportunities afforded to the broadcast networks by the retransmission consent negotiating cycles has acted as a key driver behind deals consolidating broadcast network and cable programming assets.[60] ABC/Disney paid $5.3 billion for the Fox Family channel in 2001, based in part on the view that they could recover the investment by using retransmission consent to obtain broader distribution and higher fees for the channel.[61] In highlighting the benefits of the Viacom/CBS merger, then-company President Mel Karmazin stated that "[w]e have an awful lot now of retransmission to be able to take to Viacom and have Viacom use CBS retransmission consent to get additional carriage for its properties."[62] Karmazin specifically identified Noggin and MTV-2 as cable channels which would be expected to gain wider carriage as a result of being included in CBS retransmission consent negotiations.[63] Viacom/CBS' subsequent

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'powerless' to prevent the spread of new services, but the cable channel will be 'competitive by cable standards, [but] will not pose a threat to our audiences.'"); "Fox Rallies Troops," *Variety*, January 13, 1997 (Quoting Murdoch speech to affiliates: "'Some of you remain uneasy about our moves into other media. Like it or not, new competition to broadcasting is inevitable. More channels and more video products to compete with broadcasting are coming,' Murdoch warned. 'They cannot be stopped. We ignore that reality at our own peril. Fox and Fox affiliates are far better served by meeting the marketplace challenge through expansion into complementary media and integration of those media operations to the benefit of our core business broadcasting'").

[60] *See e.g.,* "Davatzes Works to Bring A&E Back to Where It Once Belonged," *Broadcasting and Cable*, June 9, 2003 ("NBC can repurpose shows on Bravo and use retransmission consent to build out Bravo's distribution"); "Karmazin to Play Retrans Chip for MTVN Cable Nets," *Multichannel News*, May 22, 2000 (Frank Hughes, senior vice president of programming for the National Cable Television Cooperative, which represents small and midsized MSOs, said that nowadays, "It's like companies buy up all of these cable assets to do retransmission consent.").

[61] *See* "The Value of Family; Disney's Check for Fox Kids Channel Raises MSO, Advertiser Eyebrows," *Broadcasting and Cable,* July 30, 2001.

[62] "Karmazin to Play Retrans Chip for MTVN Nets," *Multichannel News*, May 22, 2000.

[63] *See id. See also* "MTVN Charts Course Amid Op Cost Squeeze," *Multichannel News*, May 6, 2002 (MTV Networks "also can use retransmission-consent for CBS-owned television stations as a playing card in contract talks with cable operators").

acquisition of BET also was fueled by the prospecting of using retransmission consent to expand cable revenue and distribution:

> Now that Viacom Inc. has become a supersized content king -- with Black Entertainment Television the next cable network set to join its fold -- cable operators and other programmers are bracing for the repercussions. MSOs and direct-broadcast satellite providers fully expect Viacom to seek substantial license-fee increases for BET and TNN: The National Network. Viacom is already floating a rate hike for TNN, which it acquired along with CMT: Country Music Television when it merged with CBS Corp. Cable operators are also betting Viacom will aggressively use that much-hated bargaining chip--retransmission consent for CBS-owned TV stations--to drive distribution for TNN and CMT, and possibly for BET. . . .Hardly shy on the topic, in a speech earlier this year Viacom president Mel Karmazin flat-out said his company would use retransmission consent as a tool to increase carriage for its cable-network stable. Viacom has already used CBS retransmission consent for deals with DBS providers this year.[64]

Industry observers have suggested that NBC will utilize its recent acquisitions of USA Networks and Bravo, as well as the Olympics, as retransmission consent currency.[65]

Today, Disney's cable revenue equals its broadcasting revenue.[66] News Corp. and Viacom each generate nearly as much from cable as they do from broadcasting.[67]

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[64] "Viacom-Sized Migraines; Ops, Small Nets Fear Content Colossus," *Multichannel News,* November 27, 2000.

[65] *See, e.g.,* "Peacock Enhances Cable Stable," *Variety*, September 8-14, 2003 ("NBC has to give cable systems permission to carry its owned-and-operated TV stations. But that retransmission consent comes at a cost. Now NBC could withhold that permission unless, say, the cable system agreed to pay a healthy increase in license fees to USA. Similarly, it's likely that NBC will funnel dozens of hours of Olympic events to USA every two years (rather than to Bravo or CNBC), making it hard for a cable system to threaten to drop a cable network that's delivering such high-octane programming"); "Peacock Power; Merger with NBC Timely for USA and Sibling Networks," *Multichannel News*, September 8, 2003 ("NBC has a battery of bargaining chips to use -- now or later -- to shore up and grow Vivendi's cable networks. They include retransmission consent for NBC-owned TV stations; carefully packaging weaker networks with strong ones; and making hay with the Olympic Games, to which NBC holds the rights through 2012"); "Ops: We Don't Want Dumping Ground," *Multichannel News,* November 11, 2002 (discussing NBC's $1.25 billion acquisition of Bravo and use of retransmission consent to enhance distribution).

Importantly, the new programming assets owned in conjunction with the major broadcast networks have become extremely valuable, worth hundreds of millions -- and even billions -- of dollars to their corporate parents:

Table B
Broadcaster Ownership of Most Valuable Cable Channels[68]

Broadcast Network	Cable Channel	Estimated Value	Source
Fox	Fox Sports	$3.77 billion	1
	FX	$2.4 billion	2
ABC	ESPN	$10.95 billion	3
	Disney	$7.66 billion	3
	Lifetime (50% share)	$2.77 billion	3
	ABC Family	$2.36 billion	3
	ESPN2	$1.26 billion	3
	A&E: (37.5% Disney; 25% NBC)	$3.50 billion	3
	Toon Disney	$1.016 billion	3
	History Channel (37.5% Disney;25% NBC)	$2.36 billion	1
	SoapNet	$759 million	
	ESPN Classic	$714.6 million	3
	Style	$267 million	
NBC	USA	$7.72 billion	3
	CNBC	$6.59 billion	3
	SCI-FI	$2.69 billion	3
CBS	Nickelodeon	$9.85 billion	3
	MTV	$8.22 billion	3
	Spike	$2.97 billion	3
	Comedy Central	$2.07 billion	4
	BET	$2.25 billion	3
	VH1	$2.25 billion	3

[1] Kagan World Media, "Cable Program Investor," Jan. 17, 2003, at 3.
[2] Kagan World Media, *Media Trends 2004*, December 2003, at 48.
[3] Kagan World Media, "Cable Program Investor," Feb. 29, 2004, at 2.
[4] Kagan typically estimates the values of cable networks at 16 to 18 times annual cash flow. With a multiple of 18, Comedy Central's 2004 cash flow of $115.1 million results in an estimated value for the

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66 *Broadcasting and Cable*, May 12, 2004.

67 Viacom generates $1.6 billion from cable and $2.1 billion from broadcasting. *Broadcasting and Cable*, July 22, 2004. News Corp. generates $596 million from cable and $914 million from broadcasting. *Broadcasting and Cable*, Nov. 10, 2003.

68 Ownership implies 50 percent or greater share in network.

network of $2.07 billion. *See* Kagan, *Cable Program Investor,* Jan. 17, 2003, at 3; Kagan, *Economics of Basic Cable* (1995), at 159.

Retransmission consent also offered the Big Four networks the ability to transform new content investments into standalone programming assets, while reducing the ultimate cost of content acquired for their flagship broadcast network fare. Before retransmission consent, only Fox was vertically integrated with a studio. Now all four broadcast networks are vertically integrated with content producers.[69] In 1995, ABC merged with Disney.[70] In 2000, CBS merged with Viacom/Paramount.[71] In 2004, NBC merged with Universal.[72] By using content already produced or purchased for broadcast in prime-time and/or shows acquired from their affiliated production studios, the broadcast networks are able to start new MVPD networks at a lower incremental cost relative to other competitors.[73] Launching new networks also reduced the costs of

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[69] *See* Rogerson, Table 4. In the early 1990s, the financial interest and syndication (fin-syn) rules were invalidated by the courts, thereby freeing the broadcast networks to acquire ownership interests in programs they select for prime time and to keep for themselves any syndication revenue earned once a show had completed its run on prime time. Because it was considered a fledgling network in the late 80s and early 90s, Fox was never subject to fin-syn.

[70] Phyllis Furman, *Disney's Eisner Testifies in Shareholder Suit Concerning Executive's Hiring*, New York Daily News, November 16, 2004.

[71] John Smyntek, *Karmazin Resigns as Viacom President*, Detroit Free Press, June 2, 2004.

[72] Harry Berkowitz, *NBC Extends Contract For Universal Executive With Successful Program Lineup*, Newsday, May 13, 2004.

[73] "CBS Ponders Cable Formats; In Retreat from Pay or Else, Net Likely to Basic-Service Retrans Trade," *Hollywood Reporter*, August 27, 1993 (Reporting CBS' decision to seek retransmission consent compensation in the form cable carriage for a new news and information cable channel, and noting that "a CBS News cable outlet would also provide CBS with a virtually cost-free revenue stream for repeat broadcasts of its highly rated magazine shows, while also giving it a much-needed promotional platform for the network news organization"); "Fox Weaves Cable Web with TCI," *Daily Variety*, May 13, 1993, ("Murdoch said Fox will spend 'in excess of $100 million in the first year' for programming on the new network . . . 'We'll use movies from our library,' he added, and

broadcast network investment in content production and acquisition by providing an additional outlet (beyond the prime time network slot) over which to recover those costs and creating a new source of revenue for affiliated program studio and content library.[74]

In short, retransmission consent has contributed to the creation of a wealth of valuable standalone MVPD programming assets for the major broadcast networks and their parent companies. The triennial retransmission consent negotiation required by law has provided the broadcast networks with multiple, mandatory bargaining opportunities to obtain carriage terms needed to establish and grow their standalone programming network assets. This provides them with multiple opportunities to create new assets with a separate brand generating a separate and recurring stream of licensing and advertising revenue.[75] Indeed, from the outset, the four broadcast networks quickly recognized that

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off-network series that Fox's Twentieth TV division produces for ABC, CBS, NBC and Fox. If Fox had run its own cable network three years ago, Murdoch said, it would probably not have sold reruns of 'L.A. Law to Lifetime'").

[74] *See, e.g*, "Fox's New Web is a Special FX," *Variety*, September 1, 1993 (FX "will rely heavily on Fox's film and TV library material . . . Fox created the basic channel as its solution to negotiations over retransmission consent, in the process providing the studio an outlet for its product similar to Paramount and USA's ownership of the USA cable network"); "CBS Surrender May End Retransmission War," *Television Digest*, August 30, 1993 ("New [CBS] cable network would make extensive use of film and reports already being shot, but often not used, for CBS's existing news programs . . . 'They have a lot of footage that goes onto the cutting room floor. If they can recycle it, it's good for them'"); "FBC Affils Hook Up With Cable Plan After Changes," *Hollywood Reporter*, June 4, 1993 ("In her speech to affiliates, [Fox Broadcasting Company Chair] Salhany suggested that the company will look for other ways to vertically integrate, including buying more programming from Twentieth TV. 'We need to develop more programming internally at Fox so that our destiny always remains in our hands,' she said. The basic cable service 'will help assure us that the potential back-end market for programs won't be foreclosed by the vertical control of other companies.'").

[75] "Viacom Nets: A Bargain at Any Price," *Multichannel News*, December 15, 2003 ("At the UBS Warburg Media Conference last Monday, Viacom chief financial officer Richard Bressler acknowledged retrans consent was a very valuable asset to Viacom. "Our retrans assets, at CBS or on the local level with our television stations, we have the ability to do multicasting, we have a collection of assets that we can use as a piece of our

retransmission consent offered them asset-creation and asset-appreciation opportunities that were unavailable to any other non-network broadcaster or non-broadcast cable programmer.[76] Rather than reinvigorate their over-the-air broadcast businesses, retransmission consent has spurred the new broadcast networks and their parent companies to pursue strategies aimed at growing their MVPD programming business and maximizing enterprise-wide revenues.[77]

D. The Continuing Fragmentation Of The Viewing Audience For MVPD Networks May Reinforce The Market Power Of Network Broadcasters

As Professor Rogerson notes: "It is widely recognized in the media industry that broadcast networks are able to command a much higher cost per viewer (advertising rates are generally quoted in CPMs or cost per thousand viewers) than are MVPD networks

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leverage. We don't work for the cable operators, we work for you guys [investors]. The whole trade off is to drive the most money to the bottom line").

[76] *See* Rogerson at 41-42 ("[C]able carriage retransmission consent deals may also have been attractive to the major network broadcasters because such arrangements offered them the opportunity to establish standalone programming assets with recurring license fee and advertising revenue."). *See also* "ABC Avoided Cable Fight," *Television Digest*, January 17, 1994 ("ABC opted to form now-operating ESPN2 with guaranteed access to cable MSOs and 'we've created a real asset' even if regulatory rules change in future, [ABC TV Network Group Pres. Robert Iger] said: 'If you looked at cash for retransmission consent, that could have gone away in the future.'"); "Newest Cable Act Child: America's Talking," *Variety*, June 27, 1994 ("'The most important function of America's Talking is to create a valuable asset for the NBC network,' said David Zaslav, senior VP of affiliate marketing sales for America's Talking).

[77] *See, e.g.*, "Dumb & Dumber," *Fortune*, May 29, 2000, p. 140 ("Disney is known throughout the entertainment industry for wanting to control as much of its content and distribution as possible. On ABC, for example, two-thirds of the programs are owned by Disney. Eisner merged the network and Disney's TV studio to promote even more vertical integration."); *Walt Disney at Citigroup Smith Barney Entertainment, Media & Telecom Conference*, FD Wire, Jan. 6, 2004 (Transcript quoting CEO Michael Eisner: "ABC offers an important promotional platform to let other Disney businesses launch new products. And we are not shy about that. . . .We are pretty unrelentless [sic] in using our schedule to make the ABC audience aware that a lot of other things are happening across the Walt Disney Company.").

because of broadcast networks' ability to deliver much larger audiences in one sitting than cable networks can."[78] The Commission's Office of Plans and Policy has recognized this as well:

> [I]n general, cable advertisements do sell at a significant CPM discount to broadcast. A recent analysis of 2001-02 data . . . suggests that the cable 'discount' ranged from 30 to 60 percent, depending on the daypart and the demographic target of the cable network. Interestingly enough, the analysis showed that the cable discount is apparently slightly larger than it was four years back during the 1997-98 season.[79]

The CPM gap between broadcast and cable rates has continued to widen in recent years:

> [T]hree years ago, general-entertainment cable networks like TNT, USA Network, and FX sold many of their prime time spots at a fat 54% CPM discount to broadcast fare. This season, that gap is even fatter: 66%. And in the demo that advertisers chase most, adults 18-49, cable's discount for shows like FX's *The Shield* widened from 54% to 60% today. Similarly, cable news networks were selling at a 44% discount to broadcast news shows. Now that's widened to 47%.[80]

The proliferation of MVPD channels has resulted in an even more fragmented MVPD audience than before, increasing the relative attractiveness of the large audiences that broadcast networks can deliver. As one trade publication put it:

> Cable, ironically, is a victim of its own success. As it steals audience from networks, advertisers have fewer opportunities to reach millions of broadcast viewers at once. That scarcity gives NBC, CBS, and the other established networks the leverage to jack up prices for their big-reach shows, those drawing 10 million - 20 million viewers.[81]

As a media buyer with an advertising and marketing firm observed:

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[78] Rogerson at 29.

[79] Jonathan Levy, Marcelino Ford-Levine & Anne Levine, *Broadcast Television: Survivor in a Sea of Competition,* Office of Plans and Policy Working Paper 37, September 2002, at 24-25.

[80] John M. Higgins, "The Great Divide: Why is the CPM Gap Widening if Cable Keeps Grabbing Viewers From Broadcast?" *Broadcasting and Cable*, March 29, 2004.

[81] *Id.*

> the more fragmented the media landscape becomes, the more integral network TV ironically becomes as the last bastion of national reach. Accordingly, they are able to defy gravity by procuring higher [prices] despite lower ratings.[82]

As Professor Rogerson concludes, "the fact that broadcast networks can command such significantly higher advertising rates than many MVPDs, and that this advantage appears to be increasing, suggests that broadcast networks will be able to maintain and solidify their ability to acquire and deliver program content more suited to the mass audience than other video programming networks can -- and thereby maintain or increase their market power."[83]

II. EVIDENCE IS LACKING THAT RETRANSMISSION CONSENT HAS FULFILLED THE CONGRESSIONAL OBJECTIVE OF STRENGTHENING THE COMPETITIVE VIABILITY OF FREE, OVER-THE-AIR TELEVISION

The retransmission consent regime was intended by Congress as a means of strengthening free, over-the-air television; however, that has not been retransmission consent's effect. Rather than utilizing retransmission consent to produce more and better broadcast offerings, the Big Four broadcasters have diverted their statutory windfall into non-broadcast MVPD programming. Despite this fact, market forces unrelated to retransmission consent have created a competitive MVPD marketplace unlike that existing in 1992.

A. Congress Intended That Retransmission Consent Be Used To Strengthen Free, Over-the-Air Television

The language and legislative history of the 1992 Cable Act make clear that the key objectives of retransmission consent were to strengthen free, over-the-air local

[82] Frank Ahrens, *Peddling Prime Time*, Washington Post, June 15, 2004, at E01.

[83] Rogerson at 31.

broadcast programming and to foster more competition between the cable and broadcast businesses. Broadcasters argued that retransmission consent was necessary to "make sure there is free television for the American people going into the 21st century."[84] Congress was concerned that without provisions to strengthen broadcasting, local stations would "be unable to continue to provide local public service programming, and may be forced to discontinue service altogether," meaning that the "almost 40 percent of American television households which do not have cable service will . . . be deprived of local program service and the diverse voices that existing local television stations provide."[85] Thus, proponents argued that "enactment of retransmission consent is essential if we are to ensure the future of free, quality, community-based television programming."[86]

Congress also envisioned that retransmission consent would invigorate new competition between cable operators and broadcasters.[87] The head of CBS, Laurence Tisch, told Congress that retransmission consent was "necessary to help preserve the ability of free television to compete aggressively against paid television services."[88] Supporters of retransmission consent argued that it would "strengthen local television stations so that they can maintain their ability to provide news, sports, weather, other

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[84] "Cable Television Regulation," Hearings before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, House of Representatives, 102d Cong., 1st Sess., June 27, 1991 (House Cable Hearings), at 1008, Statement of Laurence Tisch, Chairman and Chief Executive Officer, CBS Inc. ("*Tisch Retransmission Consent Testimony*").

[85] Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (Sept. 14, 1992) at 59 ("Conference Report").

[86] 138 Cong Rec H 8671, Statement of Rep. Fields (R-TX), September 17, 1992

[87] Conference Report at 58.

[88] *Tisch Retransmission Consent Testimony* at 994.

local programming, and network programming in competition with cable systems."[89] Proponents argued that without retransmission consent, "we may very well see the demise of the only real competitor the cable operator has today, the local broadcaster. If this happens, then those who cannot not afford cable -- the poor, the elderly, and the unemployed -- will be denied a viewing alternative. Simply put, without enacting some kind of corrective measure, we risk having a two-tier society of information haves and have nots."[90]

At the time, proponents of retransmission consent argued that negotiations would be conducted by local stations and agreements would reflect the circumstances and exigencies of local markets. National Association of Broadcasters President Eddie Fritts told Congress that retransmission consent would mean "that stations and cable operators at the local level will negotiate a contract to provide our signals on cable systems" and that "any consideration" exchanged would "flow from such a local marketplace negotiation."[91] Not surprisingly, this view was accepted by Congress. For example, Senator Inouye, Chairman of the Senate Communications Subcommittee, believed that retransmission consent would "permit local stations, not national networks, as I have indicated, to control the use of their signals."[92] Senator Inouye expected retransmission rights would be exercised by "broadcasters—and I am speaking of local broadcasters, not NBC in New York or CBS in New York or ABC in New York; I am talking about

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[89] 138 Cong Rec S 14248, Statement of Sen. Gorton (D-WA) September 21, 1992.

[90] 138 Cong Rec H 8671, Statement of Rep. Fields (R-TX), September 17, 1992.

[91] House Cable Hearings, *supra* n. 84, Statement of NAB President Eddie Fritts, at 753.

[92] 138 Cong Rec S 563, Statement of Sen. Inouye (D-HI), January 29, 1992.

channel 9 here, channel 4, or channel 7."[93] This expectation was all the more reasonable because at the time the broadcast network companies were not major players in cable programming, and of the four only Fox was affiliated with a studio.

The experience with retransmission consent since 1992 demonstrates that it has not been used in the manner envisioned by Congress. The local stations owned by each of the Big Four networks do not negotiate their own retransmission consent arrangements on a market by market basis. Those arrangements are negotiated on a national basis at the corporate level. The networks' leverage within their O&O markets is being wielded to gain MVPD carriage outside those markets. Instead of being used as a tool to strengthen free, over-the-air local broadcasting in competition with cable, retransmission consent has been used to strengthen the Big Four's affiliated MVPD networks at the expense of free, over-the-air local broadcasting.

B. The Networks Have Not Used Retransmission Consent To Strengthen Free, Over-the-Air Television

Broadcasters told lawmakers considering the 1992 Cable Act that the "major issue before you is the future of free TV for all Americans," and that "retransmission consent can help free broadcasting survive."[94] Yet, the Big Four networks have used a mandatory negotiation over the terms of carriage for public spectrum they received for free as a crowbar for entering and ultimately dominating the MVPD programming marketplace.

Local broadcasters themselves have suggested that "the major parties to benefit from the regulations [are] the Big 4 TV networks," and that "retransmission consent [has] turned into a tool for the broadcast networks to beef up their presence in the cable

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[93] 138 Cong Rec S 562, Statement of Sen. Inouye (D-HI), January 29, 1992.

[94] House Cable Hearings, *supra* n. 84; *Tisch Retransmission Consent Testimony* at 1037.

industry, a tool that has hurt the interests of broadcasting by moving to cable funds from the networks that could have been used to improve broadcast programming."[95] Indeed, while there is abundant evidence to show that retransmission consent has benefited broadcasters' affiliated MVPD networks, there is no demonstrable evidence to suggest that retransmission consent has strengthened localism or facilitated the ability of local stations to compete for marquee local programming. As one group-owned broadcast official stated: "They [the networks] did create assets for the '90s that appreciated, but not for the affiliates."[96]

Not only does carriage of broadcast network-owned programming fail to help local broadcast stations,[97] it actually hurts them because it produces more competition from broadcast-owned cable networks for advertising dollars and audience share.[98] The

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[95] "Looking Back At Retransmission," *Electronic Media*, March 4, 2002.

[96] *Id.*

[97] *See, e.g.,* "Carriage Fee Battle Heating Up," *Electronic Media,* May 3, 1993 ("FBC affiliates sounded the alarm at word that their network was trying to cut a group deal with Tele-Communications, Inc. and other MSOs that would give Fox a second cable channel to program in local markets in lieu of cash fees."); "Affiliates Question ABC Deal," *Electronic Media*, July 19, 1993 ("A number of broadcasters expressed anger and frustration last week at the retransmission consent deals that Capital Cities/ABC and the Hearst Corp. reach with Continental Cablevision. Most vocal were ABC affiliates, which said their positions at the bargaining table will be hurt by Hearst and ABC's acceptance of a rollout of their ESPN 2 in lieu of straight cash.").

[98] *See* "Carriage Fee Battle Heating Up," *Electronic Media*," May 3, 1993 ("However, key affiliates were expressing concern that the new channel could enable Fox to bypass them altogether, or at least present fresh competition for station programming. 'We're concerned because it could be another channel to compete against,' said Gregg Filandrinos, chairman of the FBC affiliates board and vice president and GM of KDNL-TV in St. Louis"); "CBS, Cablers Playing Chicken," *Hollywood Reporter*, July 20, 1993 ("ABC's deal with Continental Cablevision indicates an enormous value being placed on ABC stations. However, ABC's deal leaves affiliates out in the cold, [CBS's] Kreigel said, because it calls for a national rollout of ESPN2 in exchange for retransmission consent of only ABC O&O stations. 'The most serious question in the ABC deal is what they've done to their own affiliates,' he said").

dilution of broadcasters' viewing audience fostered by new MVPD networks and the diversion of content -- and promotional and marketing resources -- to network-affiliated MVPD networks weakens local broadcast stations.[99] Repurposed network programming carried on network-owned cable channels represent a "direct challenge" to the program exclusivity that had been the cornerstone of the network affiliate relationship.[100] Indeed, some local affiliates are so concerned about the dilutive effects of repurposed broadcast content on network-owned cable channels that they have negotiated limits on repurposing in their network affiliation agreements.[101] As Professor Rogerson notes: "[I]t may well be that much of the extra revenue stream provided to broadcasters by retransmission consent policy has actually been used to finance the development of the chief competitor to broadcasting -- MVPD program networks."[102]

There is no evidence from which to conclude that retransmission consent has been helpful in improving local news and local programming by the Big Four's owned and operated stations. Indeed, a recent study of local news programming by affiliates of the Big Four revealed that those "local TV stations have nearly given up covering local

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[99] "TV Stations: Fox, ABC Fail to Settle," *Media Week*, June 8, 1998 (Fox is pushing affiliates to okay a more lenient, shorter exhibition window for first-run programming that the network can use to feed its various cable properties, including FX and Fox Family Channel. But affiliates were resisting at their meeting with the network last week in Los Angeles"); "Below Surface at NBC, ABC Affiliate Meetings," *Television Digest*, May 22, 2000 (Noting ABC affiliates opposition to SoapNet channel).

[100] *TV Networks' Tough Talk Leaves Local Stations Fuming*, New York Times, April 12, 1999.

[101] "ABC and affiliates near NFL pact; Stations Ante up $34M, Get Prime Concessions," *Electronic Media*, October 7, 2002 ("The plan maintains the network's repurposing limit of 25 percent of its prime-time entertainment lineup and makes a variety of allowances for repurposing of other types of programming").

[102] Rogerson at 54.

political races and issues."[103] On the other hand, the Big Four's leverage of retransmission consent on behalf of affiliated networks has been accompanied by the proliferation of "repurposed" programming.[104] Further, the additional revenue garnered by the national networks from the network's carriage fees gained from retransmission consent deals has not prompted the broadcast networks to invest in quality new programming for broadcast television.[105] Instead, the era of retransmission consent has been characterized by the growth of low-cost, high-margin reality shows, and a stark reduction in new, original shows and various other indicia of broadcast programming quality.[106] Of course, as Professor Rogerson points out, "the fact that retransmission consent regulations give broadcasters an extra revenue stream in no way automatically guarantees that they will devote more resources to improving program quality."[107]

[103] *Local Politics Garners less TV Coverage*, USA Today, February 15, 2004.

[104] *See, e.g., Disney Buys Fox Family Worldwide,* San Jose Mercury News, July 24, 2001 ("We're obviously intending to program [ABC Family] using a number of programs that are already on ABC," said Iger, adding that "we negotiated a deal with our affiliates a few years ago that provided us with some broad rights in terms of re-purposing programming that initially airs on ABC: entertainment programming and prime-time, some daytime programming, news and some sports").

[105] *See* Rogerson at 5 ("Very little evidence of any sort has been presented suggesting that broadcasters have used the extra revenue stream provided to them by retransmission consent to invest in higher quality programming").

[106] *See* Rogerson at 56-58 and Tables 12 and 13. *See also Will Reality Bite TV Networks*, USA Today, March 4, 2003 (Noting jump in reality shows from 13 to 40 percent of networks' schedule and reporting that: "Hollywood studios already are nervous as networks buy more reality and fewer sitcoms and dramas . . . But there's trouble ahead if studios scale back or even quit the sitcom and drama business. Reality shows 'debase the programming engine,' says Vogel Capital Management's Harold Vogel, author of *Entertainment Industry Economics*. If networks pack prime time with such shows, 'they'll lose their writers and skill set.' Buying fewer sitcoms and dramas will mean less programming available down the road for TV stations, including the large ones the networks own.").

[107] Rogerson at 54.

Indeed, "the over-all share of programming expenditures devoted to broadcast programming has been falling constantly since 1993 and is projected to continue to fall through 2012."[108]

The Big Four's use of retransmission consent to expand their presence in MVPD network programming has occurred during the same period in which their leverage over their local affiliates has expanded. Prior to enactment of retransmission consent, the national broadcast networks typically paid their local affiliates to carry network programming, but that is no longer the case.[109] In recent years, the networks have initiated "efforts to redefine totally the network-affiliate relationship -- with the network looking to pocket the proceeds from the redefinition."[110] Five years after the commencement of retransmission consent, the New York Times noted that:

> [S]ome network executives now question the long-term value of relying on affiliated stations to deliver network programs. The executives are confident they can force the stations to accept tougher terms in the future because of a fundamental shift in the way network programs are distributed, away from traditional over-the-airwaves broadcasting and toward delivery by cable or satellite. Robert C. Wright, the president of NBC, has said that his network might consider the option of replacing an affiliate reluctant to renew its network contract in "a sensible fashion" with a channel on a local cable system.[111]

Fox "virtually redefined network affiliate relations single-handedly by . . . demanding that that its TV affiliated stations pay the broadcast networks for the privilege of carrying its programming, rather than being paid cash compensation by the network as

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108 *Id.* at 55.

109 *See, e.g., NBC to Challenge Traditional System of Payment to its Network Affiliates*, Los Angeles Times, May 19, 1998.

110 *TV Networks' Tough Talk Leaves Local Stations Fuming*, New York Times, April 12, 1999.

111 *Id.*

has always been done by its network rivals."[112] Fox also was among the first broadcast networks to ask its affiliates and owned stations for significant financial assistance to pay for costly sports programming and other content rights.[113] Now surcharge payments by affiliates to the national networks for sports programming are common.[114] The enhanced size and strength of the networks appears to have strengthened their hand in structuring their arrangements with affiliates.[115]

In short, instead of being a series of local market negotiations, the Big Four networks and their parent companies have transformed retransmission consent into a handful of national negotiations that have boosted their affiliated MVPD networks at the expense of local broadcasting. The networks and their parent companies have used retransmission consent to engender an outcome that appears to be exactly the opposite of what Congress envisioned or intended.

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[112] "DirecTV Link Fox and TV Stations; More Ground-Breaking Changes," *Mermigas on Media*, January 21, 2004.

[113] *Id.*

[114] *See, e.g.*, "ABC and Affiliates Near NFL pact; Stations Ante up $34M, Get Prime Concessions, *Electronic Media*, October 7, 2002 ("ABC affiliates seem poised to OK a two-year plan by which the stations will contribute some $34 million a year toward the network's NFL costs"); "CBS Affils to Help Pay for Tourney; Under NCAA 'Value Exchange' Net to Get 49 Nonprime Spots, $8 Million," *Television Week*, December 8, 2003 ("Under the proposed NCAA Basketball Championship 'value exchange program' announced last week, CBS affiliates will give the network 49 nonprime-time commercial spots per week-plus a collective $8 million per year to help defray the $6 billion CBS agreed to pay in 1999 for the right to revel in 'March Madness' through at least 2013").

[115] *See* "Fox Wrangles Buyback Deals; Affiliates Begrudgingly Agreeing to New Ad Swap Pacts," *Hollywood Reporter*, June 14, 2002 ("Fox Broadcasting Co. executives are ensconced in negotiations with its station affiliates as they seek a new round of agreements for the network's unpopular advertising buyback program, which calls for the affiliates to chip in a total of about $50 million a year to help the network offset rising programming costs").

C. Congress Enacted Retransmission Consent Against The Backdrop Of A Competitive Framework And Regulatory Landscape That Is No Longer Operative

Retransmission consent was designed for an era when local broadcast station ownership was decidedly less concentrated, duopolies were prohibited, broadcast licensees were banned from owning a cable system in their local markets, and when local over-the-air television was considered to be the only viable competitive alternative to cable. In 1992, when Congress created the retransmission consent regime, there were no local television station duopolies.[116] In 1996, Congress relaxed the television duopoly rule.[117] In turn, the Commission relaxed its local ownership restrictions to permit local television station duopolies.[118] In the meantime, broadcast ownership concentration levels have increased dramatically. The average number of stations owned by the top 25 group station owners nearly doubled from 1996 to 2000.[119] Since enactment of retransmission consent, the horizontal cap on ownership of broadcast stations by a single entity has increased by over 50 percent. In addition, rules limiting cable-TV cross-

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[116] *See Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking*, 7 FCC Rcd 4111 at ¶ 14 (1992).

[117] *See* Telecommunications Act of 1996 at § 202(d), Pub. L. No. 104-104, February 8, 1996 (relaxing "one-to-a-market" rule).

[118] *See* 47 C.F.R. § 73.3555(b). *See also Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903 at ¶¶ 7-8 (1999).

[119] *See 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058 at Appendix (2000) (top 25 group station owners had 12 stations on average in 1996 and 21 stations on average in 2000; the top 5 owners had 63 stations in 1996 and 164 stations in 2000). *See also id.* at ¶ 7 (since 1996 there has been "extensive consolidation in the radio and television industries."); "Special Report: Top 25 Station Groups," *Broadcasting and Cable*, January 25, 1999, at 44 (noting Fox TV's increase from 10 stations in 1996 to 22 stations in 1999); "Special Report: Top 25 TV Groups," *Broadcasting and Cable*, April 2, 2002, at 48-50 (noting Fox TV's increase to 34 stations in 2002).

ownership have been eliminated,[120] regulations restricting mergers between broadcast networks have been relaxed,[121] and the financial interest and syndication rules have been eliminated.[122] In addition, Congress gave every broadcaster in the country an additional 6 megahertz of spectrum for free to be used for digital television.

While the regulatory landscape for the network broadcasters has improved dramatically in the last decade,[123] the competitive landscape also has shifted substantially. When Congress enacted retransmission consent in 1992, approximately 40 percent of American households received their television programming solely via local over-the-air broadcast stations.[124] Since then, that number has fallen by more than half, so that today only 15 percent of American households are dependent upon over-the-air broadcasting as their only source of television.[125] While there were always questions about how empowering broadcasters to withhold their signals from MVPD subscribers advanced the policy of preserving consumer access to free over-the-air television, the rapidly shrinking number of Americans dependent upon local over-the-air broadcast

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[120] *See* 47 U.S.C. § 613 (a)(1) (repealed); 47 C.F.R. § 76.501(a) (vacated)

[121] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620 (2003).

[122] *Evaluation of the Syndication and Financial Interest Rules, Second Report and Order*, 8 FCC Rcd 3282 (1993).

[123] In contrast to the loosening of horizontal and vertical regulatory restrictions imposed upon broadcasters since the 1992 Cable Act, cable operators have been subject to new horizontal and vertical restraints, such as limits on horizontal ownership of cable systems, restrictions on cable operator carriage of vertically-integrated programming, and program access obligations for vertically-integrated cable programmers. *See* 47 U.S.C. §§ 533(f)(1)(A), 533(f)(1)(B), and 548.

[124] Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (Sept. 14, 1992) at 41.

[125] *2005 Video Competition Report* at ¶ 8.

signals as their sole source of television programming continues to weaken one of the key policy rationales for retransmission consent.

In 1992, cable operators served 97 percent of all multichannel households in the country and there was no DBS service available anywhere. Today, cable operators' share of the multichannel market has fallen to 71.6 percent, while the share held by competitors to cable has increased nearly ten-fold to 28.4 percent.[126] Professor Rogerson observes that "the emergence of DBS as a competitor to cable has also served to increase the amount of bargaining power held by the major networks and therefore has increased the extent to which broadcast networks are able to use retransmission consent regulations to extract higher payments from MSOs."[127] A decade ago, because of the limited degree of competition from alternative MVPDs, a cable operator might have experienced minimal subscriber defections due to the failure to reach a retransmission consent agreement with a local broadcaster. The presence of two strong national DBS providers offering their customers access to local broadcast signals significantly increases the risk of subscriber defections associated with failing to reach a retransmission consent agreement, thereby substantially enhancing the bargaining power of broadcasters.[128] Thus, as Professor Rogerson concludes, "broadcasters are in a very different bargaining position today than Congress understood them to be in 1992 when it originally gave broadcasters the right to bargain for compensation for retransmission consent."[129]

[126] *2005 Video Competition Report* at ¶ 9.

[127] Rogerson at 28-29.

[128] *Id.* at 29.

[129] *Id.*

III. RETRANSMISSION CONSENT LEVERAGE BY THE BIG FOUR HAS BEEN A PRINCIPAL DRIVER OF CABLE RATE INCREASES

While retransmission consent has not reinvigorated free, local television in the manner envisioned by Congress, the Big Four's use of retransmission consent as leverage to launch and grow their affiliated program networks has been a significant contributor to cable rate increases. Congress directed the Commission to establish retransmission consent regulations that take into account "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and to "ensure that the regulations . . . do not conflict with the Commission's obligation . . . to ensure that the rates for the basic service tier are reasonable."[130] Congress expected that cable rates would not be unreasonably affected, because it anticipated that retransmission consent demands would be modest. In many cases, it expected that because "broadcasters also benefit from being carried on cable systems . . . many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system."[131] Where compensation was requested, Congress anticipated a request for "joint marketing efforts, the opportunity to provide

[130] 47 U.S.C. § 325(b)(3)(A) ("[t]he Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this section do not conflict with the Commission's obligation . . . to ensure that the rates for the basic service tier are reasonable."); *see* Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (Sept. 14, 1992) at 76 ("Conference Report") ("In the proceeding implementing retransmission consent, the conferees direct the Commission to consider the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall [sic] ensure that the regulations adopted under this section do not conflict with the Commission's obligations to ensure that rates for basic cable service are reasonable").

[131] *See* Conference Report at 35-36.

news interest on cable channels or the right to program an additional channel on a cable system."[132]

The rate impact of retransmission consent on the prices for the most popular tier of cable service has been far more substantial than Congress anticipated. As a result of the exercise of retransmission consent, video channels affiliated with the Big Four account for a substantially disproportionate share of new channels added to the expanded basic tier of programming.[133] And it is the new channels added to expanded basic which have driven rate increase for that tier in recent years.

Per-channel costs for expanded basic have been largely stable -- and have actually fallen when adjusted for inflation -- even as the average tier price paid for expanded Basic has been outstripping inflation.[134] Thus, higher prices for expanded Basic are being driven by new channels being added to that tier, and video channels affiliated with the Big Four represent a substantial share of such channels.[135] Therefore, there is substantial evidence that the exercise of retransmission consent by the Big Four has been a principal driver of cable rate increases. As Professor Rogerson found:

> [S]ince the passage of retransmission consent, the Big Four broadcasters have grown to dominate the cable network programming industry. Subscription prices for cable TV have risen significantly over the past decade, and there is wide agreement that increases in programming costs have been an important factor fueling these price rises. . . . [T]he passage of retransmission consent regulations likely played a major role in contributing to these increases in programming costs by allowing broadcasters to exercise their market power over their broadcast signals.[136]

[132] *Id.*

[133] *See infra* Table D.

[134] Rogerson at 17-18. *See also Report on Cable Industry Prices*, MM Docket No. 92-266, at Attachment 4 (rel. February 4, 2005).

[135] *See infra* Table D; *see also* Rogerson at 29-30 and n. 81.

[136] Rogerson at 19.

A. Growth In Big Four-Affiliated MVPD Networks On Expanded Basic Has Contributed To Driving Up Cable Rates

The average number of non-local channels offered in the expanded basic tier[137] by cable operators increased from 37.9 to 46.3 between 1999 and 2002.[138] This represents a 22 percent increase. Therefore, the costs of expanded basic programming to cable operators would have increased by 22 percent over this period *even if* the license fees per channel had remained constant. Table C shows how the number of channels (local plus non-local channels) included in the expanded basic tier in the top five media markets has changed between 1992 and 2004.

Table C
Basic and Enhanced Basic Networks Offered by Cable MSOs

Market	Rank	Total Channels, 1992	Total Channels, 2004	% Change
New York	1	23.7	50.7	113.9%
Los Angeles	2	18.5	41.8	125.9%
Chicago	3	25.6	37.6	46.8%
Philadelphia	4	30.3	42.8	41.2%
San Francisco	5	21.8	33.6	54.1%
Average		**24.0**	**41.3**	**72.0%**

Source: *Warren Communications News,* Television and Cable Factbook 1992, *Warren Communications News,* Television and Cable Factbook 2004.

On average, the number of basic and enhanced basic channels offered by cable MSOs in the top five media markets increased by over 70 percent during this period.

[137] Cable systems typically offer subscribers access to a group of approximately 60 channels over an analog system, which includes local broadcast channels plus the most popular advertiser supported cable networks for a single monthly fee. This group of channels is sometime called the "expanded basic" service tier and is the most commonly purchased service tier in most cable systems.

[138] *See Report on Cable Industry Prices,* MM Docket No. 92-266, at 23 (rel. July 8, 2003) and *Report on Cable Industry Prices,* MM Docket No. 92-266, at 12 (rel. February 14, 2001).

As explained above, the most significant single development in the cable programming market in the last decade has been the rise to dominance of MVPD channels produced by the Big Four. Therefore, it is no surprise to find that the vast bulk of the most widely carried cable channels launched over the last decade were launched by the Big Four. Table D presents data on the twelve most widely carried cable channels launched since retransmission consent was enacted in 1992. Eight of these twelve channels are affiliated with one of the Big Four. Furthermore, two of the remaining four were launched by other broadcast groups as consideration for retransmission consent. Therefore, only two channels of the twelve channels launched since the enactment of retransmission consent (*i.e.*, Animal Planet and TCM) are not affiliated with a broadcaster in any way.

Table D
12 Most Widely Carried Video Networks
Added to Basic/Expanded Basic Since Retransmission Consent

Channel	**Year Added to Expanded Basic**	**Year One Expanded Basic Distribution**	**2003**
ESPN2 (ABC)	1993	27.1%[1]	95.9%
History (NBC)	1995	15%	94.9%
Fox News (Fox)	1996	23.7%	93.9%
Animal Planet	1996	41.8%	93.6%
HGTV **	1994	10.2%	93.4%
Disney (ABC)	1994[2]	20.2%	92.2%
FX (Fox)	1994	36.2%[3]	91.7%
Food **	1993	15.7%	91.7%
TV Land (CBS)	1996	25.5%	90.7%
MSNBC (NBC)	1996	30.7%	89.9%
Fox Sports Net (Fox)	1996	73.2%	83.1%

Table D
12 Most Widely Carried Video Networks
Added to Basic/Expanded Basic Since Retransmission Consent

Channel	Year Added to Expanded Basic	Year One Expanded Basic Distribution	2003
TCM	1994	11.5%[4]	74.3%

[1] Data from 1994.
[2] Disney transitioned from a pay service to an expanded basic cable network in the mid-1990s.
[3] Data from 1995.
[4] Data from 1995.
** HGTV is not affiliated with one of the Big 4 networks, but is used as retransmission consent consideration by Scripps. Food is not affiliated with the Big 4, but is also used as retransmission consent consideration by Scripps/Tribune.
Source: Kagan, *Economics of Basic Cable Networks* (2005), pg. 30-35, 50-52.

Table E shows how the share of broadcaster affiliated channels included in expanded basic has changed in the top five media markets.

Table E
Broadcaster-Affiliated Channels as Percent of Total Networks

Market	Market Rank	1992	2004	Change
New York	1	18.3%	47.1%	158.7%
Los Angeles	2	21.6%	53.8%	148.8%
Chicago	3	15.6%	53.2%	240.4%
Philadelphia	4	15.9%	46.3%	190.6%
San Francisco	5	22.0%	45.8%	108.2%
AVERAGE		**18.7%**	**49.3%**	**169.3%**

Source: Kagan, *Economics of Basic Cable Networks* (2005); Kagan, *Economics of Basic Cable Networks* (1993); 1992 Television & Cable Factbook, Vol. 60; 2004 Television & Cable Factbook, Vol. 72 (markets ranked in 2004 order).

In 1992, broadcaster-affiliated channels were less than 19 percent of total expanded basic channels on cable systems in the top five media markets. By 2004, broadcaster-affiliated channels were almost 50 percent of all the expanded basic channels on cable systems in the top five media markets.

In summary, the Big Four have become the dominant video programming suppliers to MVPDs and Big Four channels have been the source of most of the growth on the basic and expanded basic tiers of programming. This has in turn contributed substantially to the rise in cable rates.

As the Rogerson study finds, network broadcasters have exercised the enhanced leverage granted to them via retransmission consent in order to obtain carriage for new cable channels that operators might otherwise decline, or opt to carry only at a lower price:

> There is considerable evidence that the Big Four networks possess market power with respect to their broadcast signals. There is essentially universal agreement among industry participants and observers, including the Big Four themselves, industry analysts, the press, and the Commission, that the Big Four bundle retransmission consent together with program networks that they also produce in order to force MVPDs to (1) pay higher prices for program networks that they might have purchased in any event and (2) purchase additional program networks that they would not have otherwise purchased.[139]

In short, subscribers to MVPDs are harmed by broadcasters' exercise of market power regardless of whether it occurs through broadcasters charging higher license fees for programming or through broadcasters forcing cable operators to purchase additional programming.

B. Rising Prices For Big Four-Affiliated MVPD Networks Has Also Contributed To Driving Up Cable Rates

While programming costs would have increased even if license fees remained constant, the increase in license fees for Big Four-affiliated channels has also been dramatic. The Media Bureau's most recent cable price survey found that rates for expanded basic service increased by approximately 88 percent between 1997 and 2004.[140] Table F shows license fee data for the 40 most widely carried satellite-delivered video

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[139] Rogerson at 50.

[140] *See Report on Cable Industry Prices*, MM Docket No. 92-266, at 20 (rel. Feb. 4, 2005).

channels as of 2004. The aggregate license fee for all 40 of those networks increased by 78 percent. When the license fee data is broken down, however, it is apparent that license fees for broadcast-owned video channels in the top forty have risen substantially faster than the fees charged for non-broadcast video channels in the top forty. The license fees for cable channels in the top forty that are affiliated with broadcasters increased almost 92 percent between 1997 and 2004.

Table F
Percentage Change in License Fees
40 Most Widely Carried Video Networks
1997-2004

Broadcaster-Affiliated Network	1997 Fee ($)	2004 Fee ($)	Non-broadcaster Affiliated Network	1997 Fee ($)	2004 Fee ($)
TV LAND	0.01	0.08	TRAVEL	0.03	0.08
SPEED	0.04	0.17	FOOD	0.02	0.05
ESPN	0.73	2.27	ANIMAL	0.03	0.07
FOX NEWS	0.08	0.23	CARTOON	0.07	0.14
FOX SPORTS	0.50	1.42	HGTV	0.03	0.06
CNBC	0.13	0.25	TCM	0.16	0.26
E!	0.10	0.19	TNT	0.51	0.82
SCI FI	0.08	0.15	TBS	0.18	0.27
ESPN2	0.12	0.21	TLC	0.10	0.15
LIFETIME	0.11	0.19	GOLF	0.13	0.19
MTV	0.16	0.26	DISC	0.17	0.24
HIST	0.10	0.16	COURT TV	0.08	0.11
VH1	0.07	0.11	TWC	0.07	0.09
NICK	0.23	0.36	CNN	0.33	0.39
A&E	0.13	0.20	AMC	0.19	0.21
FAM	0.14	0.21			
FX	0.23	0.33			
CMT	0.03	0.04			
BET	0.10	0.13			
USA	0.35	0.44			
COM	0.08	0.10			
DISNEY	0.62	0.76			
SPIKE	0.14	0.17			
BRAVO	0.12	0.13			
MSNBC	0.13	0.14			
Total	**4.53**	**8.70**	**Total**	**2.10**	**3.13**

Source: Kagan, *Economics of Basic Cable Networks* (2003) at 53-54; Kagan, *Economics of Basic Cable Networks* (2005) at 33-34, 50-52, Section 11. Chart consists of 40 networks with highest coverage in U.S. multi-channel homes in 2003. Networks are sorted in descending order of percentage change in license fees. Networks without license fees such as QVC, HSN, and CSPAN were excluded; data in 1997 column for TBS and Animal Planet is from 1998; data for TV Land is from 1999.

Meanwhile, license fees for the non-broadcaster affiliated cable channels included in the top 40 have risen by 49 percent, almost half as much as their broadcast-owned rivals. Thus, as illustrated by Table G, the license fees for broadcaster-affiliated cable channels have increased almost twice as much as much as the fees for non-broadcaster affiliated cable channels during the five year period between 1997 and 2004.

Table G
Summary: Comparison of Fee Increases
For 40 Most Widely Carried Video Networks
1997-2004

	1997 Total License Fees ($)	2004 Total License Fees ($)	% Change	Gross Change ($)
Broadcaster-affiliated networks	4.53	8.70	92.1%	4.17
Non-broadcaster affiliated networks	2.10	3.13	49.0%	1.03

Source: Kagan, *Economics of Basic Cable Networks* (2003) at 53-54; Kagan, *Economics of Basic Cable Networks* (2005) at 33-34, 50-52, section 11.

While video channel license fees have increased over the last five years, broadcaster-affiliated license fees have increased far more than the overall average, while fees for non-broadcaster affiliated channels have gone up less than average:

Table H
Comparison of Cable Rate Increases and License Fee Increases for 40 Most Widely Carried Video Networks, 1997-2004

	1997	**2004**	**% change**	**Compound Annual Growth Rate**
Cable rate (BST & CPST)	$26.06	$41.04	57.5%	6.7%
Broadcaster affiliated license fees	$4.53	$8.70	92.1%	9.8%
Non-broadcaster affiliated license fees	$2.10	$3.13	49.0%	5.9%

Source: FCC Report on Cable Industry Prices (2005) at 19; Kagan, *Economics of Basic Cable Networks* (2003) at 54-55; Kagan, *Economics of Basic Cable Networks* (2005) at 33-34, 50-52, section 11.
Note: Data based on 40 most widely carried cable networks.

It is apparent from the data that exercise of retransmission consent by the Big Four was a significant driver of increases in cable rates between 1997 and 2004.

Of course, one important element to those increases has been the broadcaster-controlled sports networks, particularly ESPN and the Fox regional networks, an element that has been noted elsewhere.[141] Some of those increases are attributable to an increase in rights fees, reflecting higher player salaries. However, those underlying facts do not change the impact of those networks. Moreover, even if one excludes ESPN, ESPN2, and FoxSports from the broadcasters column, and TNT, with its NBA rights contract, from the non-broadcaster network column, the difference remains striking:

Table I
Comparison of Non-Sports Networks' Growth in Fees

	1997	2004	% Change Gross Change ($)
Broadcaster-affiliated licensee fees (non-sports)	$3.18	$4.80	51%
Non-broadcaster affiliated licensee fees (non-sports)	$1.69	$2.31	36%

CONCLUSION

As made clear from the outset, the Joint Cable Commenters believe in the marketplace and the fact that the marketplace has generally operated well. Current MVPD offerings are of extremely high value and are so perceived by most consumers. The MVPD market is increasingly competitive to the benefit of consumers.

One other reality, however, is that the government-created retransmission consent scheme has been leveraged by the Big Four Networks to become the largest force in MVPD programming and to fuel the continued expansion of the size and price of the

[141] *See, e.g. News Corp./DirecTV Merger Order* at ¶¶ 87, 147-148.

most popular tier of MVPD service. The Commission's Report to Congress should clearly reflect this reality.

Respectfully submitted,

/s/

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March 1, 2005

WDC 361208v5

Exhibit 1

AS PROMISED: THE SATELLITE DISH GIVEAWAY FROM KTRK-TV.

KTRK is giving 1500 Houstonians an opportunity to receive a

$99 REBATE

on the purchase of a DIRECTV System. Read on for details.

This Friday, Saturday and Sunday only, the first 500 Time Warner residential subscribers in the Houston DMA to call **1-877-385-5475** each day will receive a $99 rebate on the purchase of a DIRECTV System.

HERE'S THE DEAL.

Phone lines open at 9:00 a.m. and close at 6:00 p.m. If you are one of the first 500 people to call each day, you will be mailed a rebate form with a confirmation number that will entitle you to a rebate of $99 on the purchase price for a DIRECTV System purchased from any retailer. Submit your form with proof of purchase and a copy of your current Time Warner cable bill to ABC Rebate Offer R11 N369, 2230 E. Imperial Highway, El Segundo, CA 90245, postmarked no later than April 15, 2000, and you will receive a check for $99 within six (6) weeks. Limit of one system per household.

SOMETHING EXTRA FOR OUR VIEWERS.

In addition to this offer, for **anyone** who buys a DIRECTV System by April 23, 2000, and activates a DIRECTV® TOTAL CHOICE℠ programming package by May 5, 2000, DIRECTV® will offer **free** standard professional installation (one per household). Also, a **free** local channel package is offered until April 2, 2000.

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